No. 11-425

IN THE

Supreme Court of the United States

APPLEBEE'S INTERNATIONAL, INC.
Petitioner,

v.

GERALD A. FAST, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

For the last 45 years, thousands of restaurants and other employers have taken the "tip credit" as expressly permitted by the Fair Labor Standards Act (FLSA), without regard to whether the myriad duties performed by tipped employees in their occupations are directed toward producing tips. In the decision below, the Eighth Circuit, splitting with other circuits and disregarding this Court's precedents, became the first court ever to hold that the tip credit is subject to a 20% cap on related but "non-tip-producing" duties. As shown by the four *amicus* briefs supporting the petition, this misguided decision will cause profound economic harm to all businesses that depend on tipping unless this Court intervenes. Respondents' efforts to show that the case does not warrant review are unpersuasive. The petition for certiorari should be granted, and the decision below reversed.

I. THE LOWER COURTS ARE DIVIDED AS TO THE PROPER INTERPRETATION OF THE FLSA'S TIP-CREDIT PROVISION.

As Applebee's has shown, the circuits are split as to the meaning of the FLSA's tip-credit provision, with two circuits (the Eleventh and Sixth) correctly holding that the availability of the tip credit turns on whether the duties a tipped employee performs are related to his occupation, and two other circuits (the Eighth and Fifth) imposing a temporal limit on the amount of related but non-tip-producing duties an employer may assign to a tipped employee and still take the tip credit. Pet. 17–22.

1. The conflict between the decision below and the Eleventh Circuit's decision in *Pellon* v. *Business Representation International, Inc.*, 291 F. App'x 310

(11th Cir. 2008) (per curiam), is stark: The Eleventh Circuit expressly declined to follow the district court's decision in this case and emphatically rejected the Handbook's 20% rule as "infeasible," "impractical," and "impossible." *Pellon* v. *Bus. Representation Int'l, Inc.*, 528 F. Supp. 2d 1306, 1313–14 (S.D. Fla. 2007). Respondents urge the Court to ignore this direct conflict based on speculation that a future Eleventh Circuit panel might not follow *Pellon*. Opp. 10–11. But unpublished decisions are persuasive authority in the Eleventh Circuit. *United States* v. *Rodriguez-Lopez*, 363 F.3d 1134, 1138 n.4 (11th Cir. 2004); *United States* v. *Futrell*, 209 F.3d 1286, 1289 (11th Cir. 2000) (per curiam). And *Pellon* was not a mere "summary disposition" devoid of reasoning. Opp. 11. The court heard argument, "careful[ly] consider[ed]" the issue, and affirmed "on the basis of the district court's well-reasoned order." 291 F. App'x at 311.

Nor is it true that *Pellon* did not consider the question presented here. Opp. 11–12. Applying the dual-jobs regulation, the court held that duties related to a tipped employee's occupation "'need not by themselves be directed toward producing tips.'" 528 F. Supp. 2d at 1313; cf. Pet i (first question presented). That DOL did not file a brief asking for deference is beside the point. An interpretation set forth in DOL's Handbook is entitled to the same degree of deference as one relayed in an *amicus* brief, and the court rejected the Handbook's 20% limit. Likewise, that the *Pellon* plaintiffs' claims failed for independent reasons takes nothing away from the court's rejection of the 20% rule. See *Bravo* v. *United States*, 532 F.3d 1154, 1162 (11th Cir. 2008) ("alternative holdings are not dicta").

2. Equally unpersuasive is respondents' attempt to dismiss as irrelevant the Sixth and Fifth Circuit's

decisions in *Myers* v. *Copper Cellar Corp.*, 192 F.3d 546 (6th Cir. 1999), and *Roussell* v. *Brinker International, Inc.*, Nos. 09-20561, 10-20614, 2011 WL 4067171 (5th Cir. Sept. 14, 2011) (unpublished per curiam). Opp. 13. Those cases concerned the validity of tip pools rather than the availability of the tip credit, but the ultimate issue is the same: whether a server who performs too many non-tipped duties loses his status as a "tipped employee" (and thus must be paid the full minimum wage and may not be included in a tip pool for hours spent on non-tip-producing duties). See *Myers*, 192 F.3d at 549; *Roussell*, 2011 WL 4067171, at *9. Like the Eleventh Circuit, the Sixth Circuit correctly focused on whether the duties at issue relate to the occupation of a server or a separate occupation. See *Myers*, 192 F.3d at 550. The Fifth Circuit, by contrast, embraced the Eighth Circuit's erroneous view that a server who performs too many non-tipped duties ceases to be a tipped employee "'even when the nontip-producing duties are related to a tipped occupation.'" *Roussell*, 2011 WL 4067171, at *10.

The conflict between the circuits is thus real, and it is outcome-determinative. Respondents' contention that the 20% rule "is a well-settled standard," Opp. 14 n.3, is wishful thinking. Compare also *Driver* v. *AppleIllinois, LLC*, 265 F.R.D. 293, 311 (N.D. Ill. 2010) (rejecting the Handbook's "20% limit on related but non-tipped work"), with *Plewinsky* v. *Luby's Inc.*, No. 07-3529, 2010 WL 1610121, at *5 (S.D. Tex. Apr. 21, 2010) (accepting the 20% rule). The lower courts—as well as industries that employ tipped employees—are sorely in need of guidance on the FLSA's tip-credit provision. Only this Court can bring uniformity to this critically important area of the law.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS AS TO *AUER* DEFERENCE.

The decision below further warrants review because it conflicts with this Court's precedents and decisions of other circuits regarding *Auer* deference. Pet. 22–29; cf. *Christopher* v. *SmithKline Beecham Corp.*, No. 11-204 (U.S. granted Nov. 28, 2011) (certiorari granted on whether DOL's interpretation of FLSA regulations is entitled to *Auer* deference). Far from a "straightforward application" of *Auer*, Opp. 9, the decision below demonstrates just how badly a court can go astray when it disregards this Court's precedents.

1. The court of appeals first erred by deferring to DOL's "interpretation" of the dual-jobs regulation despite the absence of any relevant ambiguity. See *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 588 (2000). In an attempt to show otherwise, respondents claim that the regulation's discussion of a hypothetical waitress "plac[es] an undefined temporal limit" on related but non-tip-producing duties. Opp. 15–16. In fact, the regulation contrasts a true dual-jobs situation—"where a maintenance man in a hotel also serves as a waiter"—with a waitress whose *single* occupation includes various related duties. 29 C.F.R. § 531.56(e). It then states unequivocally that "related duties in an occupation that is a tipped occupation need *not* by themselves be directed toward producing tips." *Id.* (emphasis added). The regulation thus makes clear that, as long as non-tip-producing duties are *related* to a tipped occupation, the employee remains in that occupation, and the tip credit is available if the $30 threshold is met. The regulation is not ambiguous, and cannot possibly be read to impose a 20% cap on such duties.

By deferring to DOL's contrary "interpretation," the court of appeals created the very problem this Court sought to prevent when it held that a court must not permit an "agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588. DOL did not provide notice or an opportunity for the industry to comment on the 20% rule, depriving the agency of valuable information from affected parties and creating "unfair surprise" for employers. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 170 (2007). "This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk Am., Inc.*, v. *Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). Contrary to the court of appeals' assertion, the regulation's "failure to address" a temporal limit on related duties, Pet. App. 8a, does not create an ambiguity the agency can resolve through informal "interpretation." Unless *Auer* deference is to swallow the Administrative Procedure Act, the only proper way to impose a temporal limit on related duties is by regulation.

For that reason, the fact that DOL has promulgated other regulations codifying a 20% test does not show that such a test "is reasonable when applied to the dual-jobs regulation." Opp. 18 (citing 29 C.F.R. §§ 783.37, 552.6, 553.212). To the contrary, it shows that DOL knows how to impose a 20% cap in a regulation when it wants to, and thus underscores the impropriety of DOL's attempt to insert such a cap into the dual-jobs regulation through informal "interpretation." Moreover, the cited regulations do not support the 20% rule because each imposes a 20% cap on work that is *unrelated* to the employee's occupation, not as the Handbook would have it, a 20% cap on duties that are *related* to a tipped employee's

occupation but are not by themselves directed at producing tips.

2. Because the 20% rule is "plainly erroneous [and] inconsistent with the regulation," that should have been the end of the matter. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted). However, having wrongly concluded that DOL's interpretation of the dual-jobs regulation was entitled to *Auer* deference, the court of appeals compounded its error by failing to ask whether the regulation, as construed by DOL, is a permissible interpretation of the statute under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[1] Pet. 23–26. It is not. The 20% rule is inconsistent with the statute's plain language, which focuses on the tipped employee's "occupation" and draws no distinction between duties based on whether they produce tips; DOL's contrary interpretation is patently unreasonable. *Id*. at 25–26.

Respondents counter with two points, neither of which has merit. *First*, they contend that Applebee's waived this argument because it "did not assert that the regulation itself was an invalid interpretation of the tip-credit statute." Opp. 20. That is nonsense. Applebee's repeatedly argued that the 20% rule is inconsistent with *both* the statute *and* the regulation. *E.g.*, Opening Br. 11 (the 20% rule "is inconsistent with the statute and regulations"); *id*. at 15 (DOL's "interpretation is in conflict with the plain language of the statute and regulations"); *id*. at 18 ("Congress

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[1] Contrary to respondents' contention, Opp. 16 n.4, the Handbook itself plainly is not entitled to *Chevron* deference insofar as it directly interprets the statute. *E.g.*, *Christensen*, 529 U.S. at 587; *Clackamas Gastroenterology Assocs.* v. *Wells*, 538 U.S. 440, 449 n.9 (2003).

has clearly spoken on this issue"). Applebee's agreed only that the regulation, *as properly interpreted*, is entitled to *Chevron* deference. And at its first opportunity to address the court's error, Applebee's showed that the court had "omitted a critical step in the deference analysis" by not addressing *Chevron*, and that the regulation, as construed by the court, is "not entitled to *Chevron* deference." Reh'g Pet. 6–7. The argument is fully preserved.

Second, respondents argue that the 20% rule is a valid interpretation of the statute because the FLSA does not define "'engaged in an occupation.'" Opp. 20–21. But whatever ambiguity may reside in that phrase, it does not extend to the nonsensical result the 20% rule entails—that a waiter ceases to be a waiter if he spends 20% of his time performing duties that relate to his occupation as a waiter but do not produce tips. Moreover, because employers must make up any difference between an employee's tips and the full minimum wage, employers have no incentive to assign excessive non-tipped work. See *id.* at 21–22. The incentive is exactly the opposite.

Indeed, the scenario respondents imagine in which an employer assigns exclusively non-tipped work to an employee once he has earned enough in tips to make the full minimum wage is unrealistic and would require equally burdensome monitoring. More fundamentally, respondents identify no policy of the FLSA that would be frustrated by such a practice. Once an employee has earned the full minimum wage for all hours worked, the FLSA's policy is satisfied. As respondents make clear, their real complaint is with the current minimum wage, which they think is inadequate. Opp. 22 n.6. Respondents must present that complaint to Congress. Misconstruing the tip-credit provision so that tipped employees have a

special dispensation that allows them to earn more than the minimum wage that non-tipped employees earn is not the answer.

3. The court further erred, and split with other circuits, by failing to take account of DOL's avowedly inconsistent positions as to the propriety of the 20% rule. Pet. 28–29. Respondents say DOL's vacillation is "overstated," contending that "DOL merely briefly contemplated revising its position." Opp. 18. But the January 2009 opinion letter repudiating the 20% rule was signed by the acting administrator of the Wage and Hour Division, and thus was an "official rulin[g]" of the Division, Pet. App. 80a, not a "contemplated" one. And the brief existence of that ruling is irrelevant: That the agency simultaneously issued and withdrew the opinion letter *demonstrates* inconsistency; it does not eliminate it.

Further, respondents' contention that the 20% rule has not created "'unfair surprise,'" Opp. 19, rings hollow given DOL's own recognition that the Handbook has produced "confusion and inconsistent application." Pet. App. 81a. Nor has DOL resorted "to notice-and-comment rulemaking in an attempt to codify" the rule and eliminate the confusion. *Long Island Care*, 551 U.S. at 170–71. In any event, unfair surprise is not the only issue. The "consistency of an agency's position is a factor in assessing the weight that position is due," *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417 (1993), because an agency's equivocation suggests that its position is not securely founded in the regulation. That is the case here, where DOL has previously rejected the 20% rule it now embraces because it "benefits neither employees nor employers." Pet. App. 84a.

III. THE 20% RULE SEVERELY BURDENS EMPLOYERS OF TIPPED EMPLOYEES.

Still less is there merit to respondents' fantastic assertion that the 20% rule is readily administrable. Respondents baldly assert—without any supporting citations—that restaurants have long acknowledged and complied with the Handbook's 20% rule "without apparent difficulty." Opp. 4. Virtually the entire industry, however, has submitted *amicus* briefs that categorically refute that claim.

Those briefs explain that, "[i]n light of decades of settled industry practice," in which "restaurants have never monitored or kept track of the time tipped employees spend performing various tasks," the decision below will "fundamentally and adversely change the way that restaurants and other industries pay millions of their employees and record their time," with "staggering" and "crippling" financial impacts. Br. of the Chamber of Commerce of the United States and National Council of Chain Restaurants/National Retail Federation 5–7. To comply with the 20% rule, restaurants must undertake "the Herculean task of monitoring and tracking every task performed by every tipped employee," then properly categorize each task as tip-producing or not. Br. of American Hotel and Lodging Association 8–10. That is an "unworkable" and "untenable" administrative "nightmare," Br. of National Restaurant Association 6–7, that will have a "devastating financial impact" on small businesses, *id*. at 10, leading to "layoffs and restaurant closures," Br. of Apple American Group LLC and Other Applebee's Franchisees 13.

Respondents nonetheless contend that the 20% rule is administrable because some states have no tip credit. Opp. 24. But the absence of tip credits in some

states does not demonstrate that an incoherent federal tip credit is workable. Indeed, if the 20% rule sticks, the result may well be that employers will forgo the tip credit and institute mandatory service charges, which employers may retain and use to offset increased payroll costs. Such a result would make everyone worse off, and would nullify the bargain Congress struck when it enacted the tip credit to alleviate the financial impact of extending the FLSA to most restaurants. Likewise, that some states have "stricter standards limiting the use of the tip credit," *id.*, does not show that the 20% rule is administrable. Respondents cite no state that imposes a 20% cap on related but non-tip-producing duties, let alone any evidence that "[r]estaurants around the country" have complied with such a rule "without apparent difficulty."[2] *Id.* at 4.

Nor has Applebee's conceded that the 20% rule is feasible. Opp. 23–24. The cited record materials show only that Applebee's responded to DOL concerns that servers in one restaurant were assigned pre-shift food preparation duties and discrete dishwashing duties during certain shifts. Although the materials reflect Applebee's awareness of the 20% rule and its ability to address DOL's concerns in that isolated case by abolishing those discrete practices, they do not show that Applebee's or anyone else has ever successfully implemented DOL's unwieldy 20% rule with respect

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[2] Two states respondents cite—New York and Arizona—limit the tip credit to hours spent in the tipped occupation and do not distinguish between tip-producing and non-tip-producing duties. *See* Opp. 24–25 (citing websites). Connecticut limits the tip credit to "service duties," but defines that term to include non-tipped work such as cleaning the service area and filling condiment containers. *See id.* at 25.

to the myriad other non-tip-producing work servers routinely perform in their occupations.

IV. THIS CASE IS A PROPER VEHICLE.

Finally, there is no merit to respondents' contention that this case is a poor vehicle. Opp. 26–28. The proper interpretation of the tip-credit provision and dual-jobs regulation is a pure question of law, as is the level of deference owed to DOL's interpretation. The questions are squarely presented and require no factual development. And where, as here, "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case," the interlocutory posture is no impediment, "particularly if the lower court's decision is patently incorrect." Robert L. Stern et al., *Supreme Court Practice*, § 4.18, at 281 (9th ed. 2007). Further, if this Court holds that the 20% rule is not a permissible interpretation of the statute or regulation, the district court would not be free to "apply the identical standard at trial." Opp. 29. There is no obstacle to this Court's review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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